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No. ———

IN THE

Supreme Court of the United States

RICHARD W. HUNT
Appellant

versus

ROBERT E. McNAIR, *Governor of The State of South Carolina, et al.*

Appellees

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of South Carolina which upheld the constitutionality of the South Carolina Educational Facilities Authority Act (Section 25 of Act No. 349 of the Acts of the South Carolina General Assembly for the year 1969) as applied to and authorizing a proposed transaction between the State of South Carolina and the Baptist College at Charleston; which rejected the contention of Appellant that the said Act as so applied is invalid under the provision in the First Amendment to the Constitution of the United States that no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof; and which affirmed the action of the trial court in denying the injunctive relief against said transaction sought by Appellant in this action.

OPINION BELOW

The opinion of the Supreme Court of South Carolina has not yet been reported in the official South Carolina Reports. It is reported in *Hunt v. McNair, Governor,* 187

S. E. 2d 645. The opinion of the Court was filed on March 2, 1972, and became final on March 13, 1972. A copy of the opinion is set forth in Appendix A hereto. Notice of appeal was filed in the Supreme Court of South Carolina on April 3, 1972.

JURISDICTION

This is an action brought in the Court of Common Pleas for Charleston County, South Carolina, under the Uniform Declaratory Judgments Act, being Sections 10-2001 *et seq.* of the Code of Laws of South Carolina, 1962. By his complaint Appellant, a resident and taxpayer of South Carolina whose interests would be adversely affected thereby, sought to enjoin a transaction between the State Budget and Control Board of the State of South Carolina, acting as the State's Educational Facilities Authority and the Baptist College at Charleston, involving issuance and sale of State revenue bonds by the former for the benefit of the latter, proposed to be made under the authority of the South Carolina Educational Facilities Authority Act of 1969. Appellant based his claim for injunctive relief on a number of grounds, which included the ground that, as applied to and authorizing such transaction, the Act was invalid under the First Amendment to the Constitution of the United States as being a law respecting an establishment of religion and prohibiting the free exercise thereof. The decree of the Court of Common Pleas denying the injunctive relief sought by Appellant and holding the Act constitutional was dated May 1, 1970 (R. 39-58).

Appellant appealed therefrom to the Supreme Court of South Carolina, the State's highest Court, on a number of exceptions which included his Exception 6 assigning error in holding that the issuance of the proposed bonds under the Act does not violate the First Amendment to the Constitution of the United States. (R. 60) The decision of the Supreme Court on the appeal filed on October 22, 1970, affirmed the judgment of the Court of Common Pleas, *Hunt v. McNair*, 255 S. C. 71, 177 S. E. 2d 362. Petition for rehearing based upon Appellant's contention under the First

Amendment was denied by the Supreme Court on November 10, 1970.

Appellant appealed to the Supreme Court of the United States from the judgment of the Supreme Court of South Carolina, contending that the Act, as applied to and authorizing the transaction proposed by the Baptist College, contravenes the Establishment and the Exercise Clauses of the First Amendment.

On June 28, 1971, the Supreme Court of the United States entered the following order in this action:

> "The judgment is vacated and the case is remanded to the Supreme Court of South Carolina for reconsideration in light of this Court's decisions in *Lemon, et al, vs. Kurtzman, et al.*, 403 U.S. 602, *Tilton, et al. vs. Richardson, et al.*, 403 U.S. 672, *Earley, et al. vs. DiCenso, et al.*, 403 U.S. 602, and *Robinson et al. vs. DiCenso, et al.*, 403 U. S. 602, decided June 28, 1971. Mr. Justice Black and Mr. Justice Douglas are of the opinion that probable jurisdiction should be noted and the case set for oral argument."
>
> *Hunt vs. McNair*, 403 U. S. 945 (1971).

After the remand, the case was briefed and argued orally by the parties, and upon reconsideration the Supreme Court of South Carolina again affirmed the judgment of the Court of Common Pleas denying the declaratory and injunctive relief sought by appellant.

The jurisdiction of the Supreme Court of the United States to review the judgment appealed from is conferred by Title 28, United States Code, Section 1257 (2), which provides that final judgments rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court by appeal where (as here) is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity. The following cases are believed to sustain the jurisdiction of the Supreme Court of the United States: *Tilton v. Richardson, et al.*, 403 U. S. 672 (1971); *Lemon v. Kurtz-*

man, 403 U. S. 602 (1971); *Earley v. DiCenso*, 403 U. S. 602 (1971); *Robinson v. DiCenso*, 403 U. S. 602 (1971); and *Walz v. Tax Commission of the City of New York*, 397 U. S. 664 (1970).

STATUTE INVOLVED

The South Carolina Educational Facilities Authority Act, Section 25 of Act No. 349 of the Acts of the General Assembly of South Carolina for 1969, 56 S. C. Statutes at Large 603, is set forth in Appendix B hereto.

QUESTION PRESENTED

Does the South Carolina Educational Facilities Authority Act, supplemented by the regulations promulgated thereunder, contravene the Religious Clauses of the First Amendment to the Constitution of the United States, as applied to authorize the State to issue, sell and service its tax-free revenue bonds to obtain funds to enable the Baptist College at Charleston to refinance its outstanding indebtedness incurred for the construction of its buildings and facilities and to construct additional facilities?

STATEMENT OF THE CASE

The South Carolina Educational Facilities Authority Act (Appendix B) declares that the benefit of the people of the State, the increase of their commerce, welfare and prosperity, and the improvement of their health and living conditions depend upon the education of the present and future generations of youth; that it is essential that private institutions for higher education in the State be given appropriate additional means of education of such youth; and that this Act has the purpose of affording a measure of assistance to enable private institutions for higher education to provide the facilities and structures which are sorely needed to accomplish such objectives. (Act. Par. A)

The Educational Facilities Authority which the Act creates is composed of the members of the State Budget and

Control Board, a State agency, who are the Governor, the State Treasurer, the State Comptroller General, the Chairman of the Finance Committee of the State Senate, and the Chairman of the Ways and Means Committee of the State House of Representatives, all *ex officio.* (Act. Par. D; S. C. Code of Laws, 1962, Section 1-351 *et seq.*) The Authority is denominated a body politic and corporate and a public instrumentality performing under the Act "an essential public function."

Section D of the Act states that "all the functions and powers of the Authority are hereby granted to the State Budget and Control Board as an incident of its functions in connection with the public finances of the State."

The Baptist College at Charleston is a corporation chartered under the laws of South Carolina "to establish, equip, maintain, conduct, own and operate a Baptist, liberal arts college for educational purposes . . . and to do such acts and carry on the work of a well regulated college . . ." Its Board of Trustees consists of 25 members elected by the South Carolina Baptist Convention, which convention has the power to provide by resolution, and change from time to time, the terms of office of the various members of the board. The charter provides that the Board of Trustees "shall manage the affairs of the Baptist College at Charleston or any agency entrusted to it, in trust for the S. C. Baptist Convention consistent with the charter of the college," and that "The business and financial policy of the South Carolina Baptist Convention shall be strictly adhered to." (R. 13-19)

The subject of this action is a financing arrangement, petitioned for under the Act (R. 19-27) by the Baptist College, whereby the Authority would accept a conveyance of a substantial portion of the campus of the College, would lease the property so conveyed to the College at an agreed rental, and would then issue and sell to the public generally revenue bonds of South Carolina in the amount of $3,500,000.00 payable, principal and interest, from the rent to be received by the Authority under the lease. The pro-

ceeds of the sale of the bonds would be used (a) to pay off outstanding mortgage indebtedness of the Baptist College in an amount more than $2,500,000.00, and (b) to construct additional buildings and facilities for use in its higher education operations. The Act provides that when the bonds and interest are paid in full the Authority would convey title to the project and campus properties to the College free and clear of all liens and encumbrances. (Act. Par. H)

"Project" is defined in the Act *to include* structures available for use as a dormitory, a dining hall, student union, administration building, academic building, library, laboratory, research facility, classroom, athletic facility, health care facility, and maintenance, storage or utility facility, landscaping, site preparation, furniture, and equipment and machinery, and *not to include* "any facility used or to be used for sectarian instruction or as a place of religious worship nor any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomination."

In assisting institutions for higher education to construct, finance and refinance projects, the Authority is empowered, *inter alia*, to determine the location and character of any project to be financed under the Act; to construct, maintain, manage, operate, lease as lessor or lessee, and regulate the same; to enter into contracts for the management and operation of such project; and to establish rules and regulations for the use of a project or any portion thereof. The Authority is empowered to designate the participating institution for higher education as its agent to do these things. The Authority is also empowered, generally, to fix and revise from time to time rates, rents, fees and charges for the use of a project and for the services furnished or to be furnished by a project or any portion thereof, and to contract with any person, partnership, association or corporation or other body, public or private in respect thereof. [Act. Par. E (e), (g), (h)]

The State of South Carolina would have no liability for the payment of the bonds; they are payable solely out of the rent received by the Authority from the College, as its tenant. Bondholders would be protected by a foreclosable mortgage given by the Authority on the portion of the campus conveyed to it. (Act. Par. E (k); Par. J) In the event of default bondholders would have the right to compel the performance of all duties required by the Act or the trust agreement to be performed by the Authority, including the fixing, charging, and collecting of the rents, fees and charges authorized by the Act or trust agreement. (Act. Par. N)

In the trial court Appellant, after alleging the facts constituting his cause of action, presented his contention under the First Amendment to the Constitution of the United States in paragraph 16, sub-paragraph (b), of his complaint, as follows:

> "(b) The Act violates Article I, Section 4 of the South Carolina Constitution and the First Amendment to the United States Constitution which prohibit the General Assembly from making any law respecting an establishment of religion or prohibiting the free exercise thereof." (R. 11-12)

[Article I, Section 4, of the South Carolina Constitution contains a provision (obviously taken from the First Amendment and in the same language) that "The General Assembly shall make no law respecting an establishment of religion or prohibiting the free exercise thereof..."]

In its opinion filed October 22, 1970, the Supreme Court of South Carolina held:

> "There is no conflict between the preservation of religious freedom and the preservation of higher education under the Educational Facilities Authority Act. Plaintiff's claim that the Act and the proposed actions of the Defendants as relates to academic facilities impair his rights under the Establishment Clause is without merit."

Subsequent to the vacation of this judgment on June

28, 1971, and the remand for reconsideration, the State Budget and Control Board, acting as the Authority, under Paragraph E (a) of the Act, adopted Rules and Regulations on September 2, 1971. The record in this action was enlarged to include these Rules and Regulations by order dated October 12, 1971. They are printed as Appendix C hereto.

The regulations prescribe the form and substance of applications to the Authority by Institutions of Higher Learning for the financing, construction or equipment of the project (as defined in the Act), or for the refunding of outstanding obligations, mortgages or other advances, including the submission of copies of the proposed lease agreement and Trust Indenture.

They also contain provisions relating to the Lease Agreement and the Trust Indenture.

The Lease Agreement is required to include a covenant (enforceable by a proceeding in any court of competent jurisdiction at the instance of the Authority, the Attorney General, or any taxpayer of the State) that neither the leased land, nor any facility located thereon, shall be used for sectarian instruction or as a place of religious worship, or primarily in connection with any part of the program of a school or department of divinity for any religious denomination.

The Trust Indenture "shall create a foreclosable lien by way of mortgage in favor of the Trustee thereof covering the project site and all equipment or other property to be located thereon," and "shall mortgage the right, title and interest of the Authority in and to the Lease Agreement," including lease rentals, revenues and receipts accruing to the Authority in connection with its ownership of a Project.

The Lease Agreement may contain provisions whereunder, in the event of involuntary judicial sale as a result of any foreclosure of any mortgage or sale pursuant to any order of any court, the title to be vested in any purchaser at such judicial sale, other than the Institution, shall be in

fee simple and shall be free of the condition as to religious use which is otherwise applicable to the Institution or any voluntary grantee thereof.

The Trust Indenture may likewise provide that, upon foreclosure of the project mortgage and the sale of the premises to any person other than the Institution, any purchaser other than the Institution shall receive title free and clear of the rights of the Authority and the Institution without conditions restricting the religious use of the premises.

In the opinion filed March 2, 1972 Appellant's contentions based upon the Religious Clauses of the First Amendment were overruled and the trial court's judgment again affirmed.

Undertaking to distinguish the Rhode Island statute in part because "Schools' financial records were subjected to audit by the State," and the Pennsylvania statute because "participating schools were required to maintain prescribed accounting procedures to identify the cost of secular education services; the accounts were subjected to State audit," the Supreme Court observed that surveillance on the part of the State is not necessary under the proposed financing plan; that the State "plays a passive and very limited role ... serving principally as a mere conduit through which institutions may borrow funds;" and that "upon delivery of the bonds the interest of the Authority would, for all practical purposes, cease."

Rejecting the argument that "the broad language of the Act causes the State, of necessity, to become excessively involved in the operation, management and administration of the College," the Supreme Court stated that under the Act and the College's proposal "the basic function of the Authority is to see that religion is not promoted on the leased premises, and that fees are charged sufficient to meet the bond payments."

THE QUESTION IS SUBSTANTIAL

Early in the opinions in *Lemon v. Kurtzman* and *Tilton v. Richardson* reference is made to the three main evils or concerns against which the Establishment Clause was intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity. *Walz v. Tax Commission*, 397 U. S. 664, 668."

Appellant contended in the Supreme Court of South Carolina that the Authority's exercise of its statutory functions in respect to student fee-fixing and fee-revision from time to time to see that the bonds are paid would cause active and continuing involvement of the State in the fiscal affairs of the Baptist College; that removal, under the Authority's regulations, of the restriction against religious use of the project facilities in favor of a purchaser at a foreclosure sale under any mortgage would have the effect of affording financial support of religion; and that sponsorship and support of religion would also be involved in the instant transaction by the refinancing of the Baptist College's outstanding indebtedness incurred to construct its existing educational facilities without separation as to sectarian and secular use and without restriction as to sectarian use.

As to active involvement, this Court in *Lemon v. Kurtzman* stated:

> "In order to determine whether the government entanglement with religion is excessive, we must examine the character and purpose of the institutions which are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority. Mr. Justice Harlan, concurring in *Walz, supra*, echoed the classic warning as to 'programs whose very nature is apt to entangle the State in details of administration'. Here we find that both statutes foster an impermissible degree of entanglement."

The Rhode Island and the Pennsylvania statutes both involved State examination and post-auditing of the rec-

ords of the church schools which would create an intimate and continuing relationship between church and state.

The plurality opinion in *Tilton v. Richardson* emphasized that the "one-time, single-purpose" construction grant involved "no continuing financial relationships or dependencies, no annual audits, and no analysis of an institution's expenditures on secular as distinguished from religious activities."

Paragraph E (g) of the South Carolina Act empowers the State Budget and Control Board acting as the Authority "to fix and *revise from time to time* and charge and collect rates, rents, fees and charges for the use of and for the services furnished or to be furnished by a project." etc. [Emphasis added]

Paragraph L of the Act provides that the Authority "may fix, revise, charge and collect rates, rents, fees and charges for the use of and for the services furnished or to be furnished by each project," etc.

Paragraph N of the Act provides that any holder of revenue bonds issued under the Act or any coupons may enforce and compel the performance of all duties required by this Section or by such resolution or trust agreement to be performed by the Authority * * * including the fixing, charging and collection of the rates, rents, fees and charges herein authorized," etc.

The financial ability of the Baptist College to pay the rent which retires the bonds and coupons necessarily depends upon the receipt from its students of adequate fees and charges for its total educational services. Fees and charges must necessarily be adjusted from time to time (as recognized in Paragraph E (g) referred to above) to reflect, among other factors, the number of students and the current operating costs.

The Board's function in fixing fees and charges is not a one-time act at the time of the making of the loan. The Board must keep informed of the College's financial condition and fiscal needs, by examination and auditing of its fiscal records, in order to discharge its obligation to the

bondholders, which is, as stated by the Supreme Court of South Carolina, "to see that fees are charged sufficient to meet the bond payments."

In addition, the Board's functions and powers are granted to it in the Act "as an incident of its functions in connection with the public finances of the State." (Par. D) The Board, as the core of the State government, is concerned with the credit of the State. The revenue bonds are to be issued as State bonds, and default in their amortization would adversely affect the State's credit standing.

The Supreme Court of South Carolina recognized this practical fact of economic life in *State ex rel Roddey v. Byrnes*, 219 S. C. 485, 507, 66 S. E. 2d 33, 42 (1951) where it observed that "it is not believed that a state in this enlightened day would allow its so-called revenue bonds to go unpaid irrespective of its technical legal liability."

The Board is thus under a strong motivation, both by reason of its duty to the bondholders and its duty to the State, to be at all times concerned with the operations of the College affecting its financial condition.

The Supreme Court of South Carolina in the judgment appealed from found that "there is less potential for experiencing the substantive evils which the religious clauses were intended to protect than in *Tilton*."

Appellant respectfully submits, however, that the finding should have been, under the principles of *Walz v. Tax Commission*, *Lemon v. Kurtzman* and *Tilton v. Richardson*, that the State's inevitable active and continuing involvement in the Baptist College's financial affairs throughout the life of the bond issue causes a conflict between the Act and the Religious Clauses of the First Amendment.

Although the Act and the Regulations contemplate restriction of the use of the project facilities to secular purposes, the Regulations contain provisions, at the Institution's option, whereunder this use restriction could be removed in favor of the purchaser at a judicial sale under the foreclosure of any mortgage, which would include the

mortgage to the Authority and also a mortgage given by the Institution after re-purchase of the facilities by paying the indebtedness. The only purpose of such a removal provision would be to permit the religious use of the facility by the purchaser.

It is true here as it was in *Tilton v. Richardson* that "the unrestricted use of a valuable property is in effect a contribution of some value to a religious body," and that the original governmental assistance will in part have the effect of advancing religion if the facility which results therefrom can be "converted into a chapel or otherwise used to promote religious interests," whether by the recipient of the assistance, or its involuntary grantee who advanced credit upon the value resulting from the lack of restriction against sectarian use, or a third party purchaser of the property for religious use.

The Baptist College's proposed transaction includes the refinancing out of the proposed revenue bond issue of certain outstanding First Mortgage bonds and other indebtedness.

The indebtedness to be thus refunded was incurred in "constructing and acquiring the necessary educational facilities" to implement the Institution's total program of education, sectarian and secular, without separation between such uses and without formal restriction upon religious use of any of the facilities.

It would seem that a State or Federal Grant for the same purpose, without separation or formal restriction, would have the effect of impermissibly advancing religion under the holding in *Tilton v. Richardson.* Appellant contends that the refunding of the Institution's indebtedness incurred for the construction of its existing educational facilities would have a like effect.

It is respectfully submitted that the question presented by this appeal is substantial and that it is of public importance.

Respectfully submitted,

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Orangeburg, South Carolina.

ROBERT McC. FIGG, JR.,
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Counsel for Appellant.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RICHARD W. HUNT, individually and representing all of the taxpayers of the State of South Carolina,
Petitioner,

versus

ROBERT E. McNAIR, Governor of the State of South Carolina, GRADY L. PATTERSON, JR., Treasurer of the State of South Carolina, JOHN H. MILLS, Comptroller General of the State of South Carolina, EDGAR A. BROWN, Chairman of the Senate Finance Committee, ROBERT J. AYCOCK, Chairman of the Ways and Means Committee of the House of Representatives, constituting the Budget and Control Board of the State of South Carolina; DANIEL R. McLEOD, Attorney General of the State of South Carolina, and BAPTIST COLLEGE AT CHARLESTON, an eleemosynary South Carolina corporation, *Respondents.*

CASE NUMBER 19378

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Petitioner, Richard W. Hunt, individually and representing all of the taxpayers of the State of South Carolina, hereby appeals under 28 U.S.C.A., Section 1257(2) to the Supreme Court of the United States from the final Order and Judgment of the Supreme Court of South Carolina, entered March 13, 1972, based upon its opinion filed on March 2, 1972.

T. B. BRYANT, JR.
P. O. Drawer 1265
Orangeburg, S. C. 29115

ROBERT MC. FIGG, JR.
P. O. Box 944
Columbia, S. C. 29202

Orangeburg, South Carolina, April 3, 1972

Service of the within Notice acknowledged April 4, 1972

HUGER SINKLER

Attorney for the Respondents

Appendix A

Opinion of the Supreme Court of South Carolina
Filed March 2, 1972

PER CURIAM: This case was initially decided by the Court of Common Pleas for Charleston County. The order of that court was appealed. This Court heard the same, and by opinion filed on October 22, 1970, affirmed the order of the lower court. See *Hunt v. McNair, et al.*, 255 S. C. 71, 177 S. E. (2d) 362 (1970).

Thereafter an appeal was taken to the Supreme Court of the United States. On June 28, 1971, that Court remanded the case to us for "reconsideration in the light of . . . decisions in *Lemon, et al. v. Kurtzman, et al.*, 403 U. S. 602, *Tilton, et al., v. Richardson, et al.*, 403 U. S. 672, *Earley, et al., v. DiCenso, et al.*, 403 U. S. 602, and *Robinson, et al., v. DiCenso, et al.*, 403 U. S. 602, decided June 28, 1970." All of these cases deal with freedom of religion, the establishment clause and the first amendment to the Constitution of the United States.

By reason of the directive of the Supreme Court of the United States we must now determine in the light of these cases whether the Educational Facilities Authority Act (enacted by the General Assembly of South Carolina in 1969) and its proposed use and application, violates the first amendment to the Constitution of the United States.

Under the provisions of the Educational Facilities Authority Act (herein referred to as the Act), the Budget and Control Board of the State of South Carolina (the Board), acting as the Educational Facilities Authority (the Authority) is authorized to provide financing for institutions of higher learning by its issuance of revenue bonds payable solely out of the revenues derived by the Authority from the particular project or institution for which they are issued. The bonds are secured by a mortgage on the project so financed.

The Act states that it shall not include "any facility used or to be used for sectarian instruction or as a place of religious worship nor any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomination."

The Act declares the Authority to be a body politic, and declares its purpose to be "to assist institutions for higher education in the construction, financing and refinancing of projects." It empowers the Authority to adopt rules and regulations for the conduct of its affairs.

The defendant, Baptist College at Charleston, a South Carolina eleemosynary corporation (the College) has petitioned the Authority seeking the preliminary approval of the Authority for the issuance of revenue bonds not exceeding $3,500,000 pursuant to the said Act for the purpose of (a) paying off outstanding indebtedness of the Baptist College Foundation incurred for the purposes of acquiring certain equipment and trailers utilized as a part of the College's educational plant (the payment for which the College is responsible) in the amount of approximately $275,000; (b) reimbursing in part the College's Current Fund for moneys advanced to the College's Plant Fund used to purchase school equipment and other capital improvements and for the payment of the aforesaid obligation of the Baptist College Foundation; and (c) refunding an outstanding indebtedness of the College in the amount of approximately $2,500,000 represented by the College's first mortgage serial bonds dated July 1, 1966.

In accordance with the provisions of the Act the College proposes to convey substantially all of its campus to the State of South Carolina at no cost to the State. The Authority would then lease the property so conveyed to the College under a lease agreement by which the College would be obligated to operate and maintain it as an institution of higher learning and to pay to the Authority or a designee, rentals in an amount sufficient to meet the payments of principal and interest as they become due on the proposed revenue bonds. The Authority would issue the revenue bonds and make the proceeds available to the College for the purposes aforesaid and the bonds would be repayable solely from the rentals to be paid by the Baptist College under the lease agreement. The bonds would be further secured by a Trust Indenture (mortgage) between the Authority

and a bank, as trustee, (acting in lieu of the Authority) which would constitute a foreclosable lien on the property conveyed to the State. When the bonds are paid the Authority would deed the property back to the College subject to restrictions as required by the rules set forth hereinafter. The debt is not a debt or obligation of the State.

Excluded from the property to be conveyed by the College to the State is the library which is being financed in part by a loan from the Department of Health, Education and Welfare; a dormitory which is being financed in part by a loan from the Department of Housing and Urban Development; a dormitory which is currently under lease to the College, and the Physical Education Building where facilities which are used for religious worship are located. Excluded also are approximately 50 acres of land forming a part of the College campus.

By petition to the Authority the College has sought to avail itself of the Act. The Authority, by resolution, has given preliminary approval to the financing arrangement. Thereafter, this action was commenced by the plaintiff to enjoin the defendants from further pursuit of the plan.

The overall purpose of the Act is to permit colleges to borrow funds advantageously by using the State's income tax-free basis as relates to the issuance of bonds. Bondholders are not required to pay income tax on dividends or interest from bonds issued by the State; accordingly, a lower rate of interest is available which inures to the benefit of the College. Under the plan the State issues the bonds, but the money goes to the College. The College, and not the State, pays the bonds through rentals paid the Authority or trustee. There is no cost to the State incident to the entire plan of financing.

Pursuant to the power given to the Authority to adopt rules, the Authority has adopted rules as follows:

> "1. Each Lease Agreement must contain a covenant obligating the Institution that neither the leased land, nor the facility located thereon, shall be used for sectarian instruction or as a place of religious worship,

or in connection with any part of the program of a school or department of divinity of any religious denomination.

"2. Each Lease Agreement shall contain a provision permitting the Authority or any agent of the Authority to conduct such inspections as may be necessary to determine whether the leased premises, or any portion thereof, or any facility located thereon, is being used or has been used for sectarian instruction or as a place of religious worship, or in connection with any part of the program of a school or department of divinity for any religious denomination.

"3. Each Lease Agreement shall contain an appropriately worded provision providing that the covenant referred to in Paragraph 1 above may be enforced at the instance of the Authority, the Attorney General of South Carolina, or any taxpayer of South Carolina by a proceeding in any court of competent jurisdiction, by injunction, *mandamus* or other means.

"4. If the Lease Agreement contains a provision permitting the Institution to repurchase the project upon payment of the bonds, then in such instance the Lease Agreement shall provide that the Deed of reconveyance from the Authority to the Institution shall be made subject to the condition that so long as the Institution, or any voluntary grantee of the Institution, shall own the leased premises, or any part thereof, that neither the leased premises, nor any facility thereon, shall be used for sectarian instruction or as a place of religious worship, or used in connection with any part of the program of a school or department of divinity of any religious denomination. Such condition shall provide that upon any violation thereof, the subject premises shall revert in fee simple to the Authority and to its successors and assigns. The condition may provide, at the option of the Institution, that if the leased premises shall become the subject of an involuntary judicial sale, as a result of any foreclosure

of any mortgage, or sale pursuant to any order of any court, that the title to be vested in any purchaser at such judicial sale, other than the Institution, shall be in fee simple and shall be free of the condition applicable to the Institution or any voluntary grantee thereof."

In our previous opinion, *Hunt, supra*, we said: "Having held that neither the credit of the State nor the property of the State is involved, it follows that this constitutional provision [the establishment clause] is not violated. There is no conflict between the preservation of religious freedom and the preservation of higher education under the Educational Facilities Act."

Pursuant to the ruling of the Supreme Court of the United States on June 28, 1971, counsel for plaintiff and defendants have re-argued the case and submitted additional briefs in the light of *Lemon, Tilton, Earley* and *Robinson.*

Plaintiff now submits three questions for the consideration of this Court:

"QUESTION I

"Under the Educational Facilities Authority Act and the proposed transaction thereunder between the Baptist College at Charleston and the State of South Carolina acting through the State Budget and Control Board, is the State impermissibly involved in the Institution's affairs in contravention of the Religion Clauses of the First Amendment?

"QUESTION II

"Does the proposed transaction afford State sponsorship and financial support to the Baptist College at Charleston's total program of sectarian as well as secular purposes in contravention of the Religion Clauses of the First Amendment?

"QUESTION III

"Does the proposed transaction constitute State financial support of the Baptist College at Charleston

in contravention of the Religion Clauses of the First Amendment, insofar as the project facilities may be authorized to be used for religious purposes by a purchaser at a judicial sale under foreclosure of a mortgage given thereon by the Authority or by the Institution itself subsequent to its repurchase thereof?"

The language of the first amendment to the Constitution of the United States and the language of Article 1, Section 4, of the Constitution of South Carolina are, for all intents and purposes, the same. Accordingly, our reasoning is applicable to both constitutional provisions. The establishment clauses are intended to afford protection against sponsorship, financial support and active involvement of the government in religious activity. *Walz v. Tax Commission*, 397 U. S. 64 (1970).

The legislative intent is set forth in the Act as follows:

"To Create an Educational Facilities Authority

"(A) It is hereby declared that for the benefit of the people of the State, the increase of their commerce, welfare and prosperity and the improvement of their health and living conditions it is essential that this and future generations of youth be given the fullest opportunity to learn and to develop their intellectual and mental capacities; that it is essential that institutions for higher education within the State be provided with appropriate additional means to assist such youth in achieving the required levels of learning and development of their intellectual and mental capacities; and that it is the purpose of this section to provide a measure of assistance and an alternative method to enable institutions for higher education in the State to provide the facilities and structures which are sorely needed to accomplish the purposes of this act, all to the public benefit and good, to the extent and manner provided herein."

We find nothing in the case before us that undermines the State's legislative intent; it is therefore accorded appropriate deference.

Though three questions are posed, there is in actuality only one basic question for our determination: Is the Act legislation respecting an establishment of religion or prohibiting the free exercise thereof in contravention of the establishment clause? We think it is not.

Prior to *Lemon, Tilton, Earley and Robinson*, there were three significant cases decided by the Supreme Court of the United States on the point. In *Everson v. Board of Education*, 330 U. S. 1 (1947), the Court held that a New Jersey statute providing bus transportation for school children attending Catholic schools was in the nature of general welfare legislation, and that the assistance provided was neutral in its relations with groups of religious believers and non-believers, and that the statute had a secular legislative purpose, the effect of which was to neither advance nor inhibit religion.

In *Board of Education v. Allen*, 392 U. S. 236 (1968), the Court upheld the loan of secular books to students attending parochial schools, holding: ". . . this court has long recognized that religious schools pursue two goals, religious instruction and secular education . . . ." In determining the validity of the challenged statute, the Court utilized the secular purpose and primary effect test under which, to withstand the strictures of the establishment clause, there must be a secular legislative purpose and a primary effect which neither advances nor inhibits religion. The statute was upheld on the ground that its stated legislative purpose clearly was secular, and the primary effect of the loan of secular textbooks could not be said either to advance or inhibit religion.

In *Abington Tp. School District v. Schempp*, 374 U. S. 203 (1963), the Court fashioned a test for distinguishing between forbidden involvement of the State with religion and those which the establishment clause permits:

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative

power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be secular legislative purpose and a primary effect that neither advances nor inhibits religion."

On June 28, 1971, the Supreme Court of the United States decided the four cases referred to hereinabove. In *Earley* and *Robinson*, citizens and taxpayers of Rhode Island brought suit against state officials to enjoin, as repugnant to the religious clauses of the first amendment and the due process clause of the fourteenth amendment, the operation of a Rhode Island statute providing for payment of up to 15% annual salary supplements to teachers of secular subjects in non-public elementary schools.

In *Lemon*, a similar action against State officials was instituted by Pennsylvania residents and taxpayers challenging the constitutionality of a statute which provided for State reimbursement of non-public elementary and secondary schools for costs of teachers' salaries, textbooks and instructional materials in specified secular subjects, but prohibiting reimbursement for any course that contained any subject matter expressing religious teaching or the morals or forms of worship of any sect.

The Court held that both the Rhode Island and Pennsylvania statutes were unconstitutional under the religion clauses of the first amendment, as fostering, by their cumulative impact, excessive entanglement between government and religion. In so holding the Court considered:

> "(1) the religious purpose and operation of church related elementary and secondary schools, (2) the enhancement of the process of religious indoctrination resulting from the impressionable age of the pupils, particularly in elementary schools, (3) the necessity of state surveillance to insure that the teachers, who were subject to control by religious organizations, observed the restrictions as to purely secular instruction, (4) the states' examination of the parochial schools' financial records to determine which expendi-

tures were religious and which were secular, (5) the probable intensification of political divisiveness along religious lines resulting from the annual appropriations required under the statutes, benefiting relatively few religious groups, and (6) the self-perpetuating and self-expanding propensities of the innovative statutory programs."

We think our case easily distinguishable from these three cases. Under the Rhode Island statute, in order to receive the 15% supplement, teachers were required to be employed in a non-public school at which the average per-pupil expenditure on secular education was less than the public school average. Schools' financial records were subjected to audit by the State. The teacher was required to teach only those subjects offered in the public schools, using teaching materials used in the public schools. Upon applying for the salary supplement the teacher was required to agree in writing not to teach a course in religion while receiving salary supplements. Only teachers in Catholic schools applied.

Under the Pennsylvania statute, participating schools were required to maintain prescribed accounting procedures to identify the cost of secular education services; the accounts were subjected to State audit; reimbursement was limited to courses presented in the public school curricula; and textbooks and materials were subjected to approval by the State.

In the light of the cumulative impact of such plans, the Court held:

"A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts

will involve excessive and enduring entanglement between state and church."

In discussing the Pennsylvania statute the Court said:

"As we noted earlier, the very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and state. The Pennsylvania statute, like that of Rhode Island, fosters this kind of relationship."

The surveillance on the part of the State, obviously abhorred by the Court, is not necessary under the proposed financing plan of the college. The Court contemplates execution of a contract which definitely establishes the rights of all parties to the agreement. The State plays a passive and very limited role in the implementation of the Act, serving principally as a mere conduit through which institutions may borrow funds for the purposes of the Act on a tax-free basis. There is in no sense a banking relationship between the Authority and institutions which utilize the Act. The plan of financing is patterned closely after that successfully functioning under the South Carolina Industrial Revenue Bond Act approved by this Court in *Elliott v. McNair*, 250 S. C. 75, 156 S.E. (2d) 421 (1967). The Authority would take title to the property by deed, issue revenue bonds to finance the project, mortgage the project property to a trustee bank, lease the project back to the College, and simultaneously assign all of the Authority's rights under the lease to the trustee in order to provide for the payment of the bonds. The trustee would disburse them on the order of the institution (subject to proper safeguards assuring a proper application of the proceeds to the purpose for which the bonds were issued) so that upon delivery of the bonds the interest of the Authority would, for all practical purposes, cease.

Counsel for plaintiff argues that the broad language of the Act causes the State, of necessity, to become excessively involved in the operation, management and administration of the College. We do not so construe the Act. A read-

ing of the Act and the proposal of the College as submitted to the Authority by petition for approval, indicates that the basic function of the Authority is to see that religion is not promoted on the leased premises, and that fees are charged sufficient to meet the bond payments. The decisions recognize that some involvement between church and State is not constitutionally obnoxious. It is a question of degree and each case must be judicially determined on its own facts, taking into consideration all of the relevant factors.

When one considers the character and purpose of the College and the nature of the assistance provided, and the resulting relationship between the government and the College, it necessarily follows that there is less potential for experiencing the substantive evils which the religious clauses were intended to protect than in *Tilton*.

Tilton also related to the establishment clause of the Constitution of the United States, but arose on a different factual basis. Taxpayers and residents of Connecticut challenged the constitutionality of the Higher Educational Facilities Act of 1963, alleging that it violated the first amendment. That Act authorized federal grants to institutions of higher education for construction of academic facilities, *except those to be used for sectarian instruction or worship*, or in connection with the program of a divinity school or department. Under the Act the government would retain only a 20-year interest in the financed facilities, and if a facility should be used other than as a secular academic facility during such period, the United States government would be entitled to recover back a proportionate part of the federal grant. Five members of the Court agreed that the religion clause of the first amendment was not violated by the Act insofar as it authorized grants to church-related colleges for construction of buildings and facilities to be used exclusively for secular educational purposes. Eight members of the Court agreed that the first amendment was violated by the act's provision limiting the government's interest in covered facilities to

a 20-year period. The Court found constitutionally objectionable only the 20-year provision which allowed use of the facilities for sectarian purposes after that period. The Court said:

> "Limiting the prohibition for religious use of the structure to 20 years obviously opens the facility to use for any purpose at the end of that period. It cannot be assumed that a substantial structure has no value after that period and hence the unrestricted use of a valuable property is in effect a contribution of some value to a religious body. Congress did not base the 20-year provision on any contrary conclusion. If, at the end of 20 years the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion.
>
> "To this extent the Act therefore trespasses on the Religious Clauses. . . ."

We think the facts in *Tilton* are greatly similar to the facts in this case, but the 20-year limitation involved in *Tilton* is absent in the case before us. As pointed out hereinabove, facilities used or to be used for sectarian instruction or as a place of worship are excluded under the Act. In addition, the rules issued by the Authority specifically provide that the properties conveyed, and later re-conveyed, may not be used for sectarian instruction or as a place of worship, and provide that when the property is deeded back to the college the deed shall contain a restriction that the premises and facilities shall not be used for sectarian instruction or a place of worship or in connection with a program of a school of divinity. Accordingly, we find and conclude that the objection sustained in *Tilton* is not present here.

From a study of the whole of the record, including the Act itself, we conclude that the Act is a valid exercise of the legislative power of the General Assembly of South Carolina. It has a secular legislative purpose. It neither

advances nor inhibits religion. There is no fostering of an excessive government entanglement with religion.

We have considered all issues in the light of *Lemon*, *Robinson*, *Earley* and *Tilton*, and conclude that the relief sought by the plaintiff must be denied. The establishment clause of neither the United States Constitution nor the Constitution of South Carolina is violated. The defendants constituting the Budget and Control Board, and the defendant, Baptist College at Charleston, may proceed with the proposed issuance of revenue bonds pursuant to the Act.

The judgment of the lower court is

AFFIRMED.

/s/ JOSEPH R. MOSS *C.J.*
/s/ J. WOODROW LEWIS *A.J.*
/s/ THOS. P. BUSSEY *A.J.*
/s/ J. M. BRAILSFORD *A.J.*
/s/ BRUCE LITTLEJOHN *A.J.*

Appendix B

Section 25 of Act No. 349 of the Acts of The General Assembly of 1969

SECTION 25

To Create an Educational Facilities Authority

(A) It is hereby declared that for the benefit of the people of the State, the increase of their commerce, welfare and prosperity and the improvement of their health and living conditions it is essential that this and future generations of youth be given the fullest opportunity to learn and to develop their intellectual and mental capacities; that it is essential that institutions for higher education within the State be provided with appropriate additional means to assist such youth in achieving the required levels of learning and development of their intellectual and mental capacities; and that it is the purpose of this section to provide a measure of assistance and an alternative method to enable institutions for higher education in the State to provide the facilities and structures which are sorely needed to accomplish the purposes of this act, all to the public benefit and good, to the extent and manner provided herein.

(B) This section, when codified, may be referred to and cited as the "Educational Facilities Authority Act."

(C) In this section, the following words and terms shall, unless the context otherwise requires, have the following meanings:

(a) "Authority", shall mean the State Budget and Control Board of South Carolina acting as the Educational Facilities Authority.

(b) "Project", shall mean a structure or structures available for use as a dormitory or other housing facility, including housing facilities for student nurses, a dining hall, student union, administration building, academic building, library, laboratory, research facility, classroom, athletic facility, health care facility, and maintenance, storage or utility facility and other structures or facilities related thereto or required or useful for the instruction of students or the conducting of research or the operation of an institution for higher education, including parking and other facilities or structures essential or convenient for the orderly conduct of such institution for higher education,

and shall also include landscaping, site preparation, furniture, equipment and machinery and other similar items necessary or convenient for the operation of a particular facility or structure in the manner for which its use is intended but shall not include such items as books, fuel, supplies or other items the costs of which are customarily deemed to result in a current operating charge, and shall not include any facility used or to be used for sectarian instruction or as a place of religious worship nor any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomination.

(c) "Cost", as applied to a project or any portion thereof financed under the provisions of this act embraces all or any part of the cost of construction, acquisition, alteration, enlargement, reconstruction and remodeling of a project including all lands, structures, real or personal property, rights, rights of way, franchises, easements and interest acquired or used for or in connection with a project, the cost of demolishing or removing any buildings or structures on land so acquired, including the cost of acquiring any lands to which such buildings or structures may be moved, the cost of all machinery and equipment, financing charges, interest prior to, during and for a period of not more than two years after completion of such construction and acquisition, provisions for reserves for principal and interest and for extensions, enlargements, additions and improvements, the cost of architectural, engineering, financial and legal services, plans, specifications, studies, surveys, estimates of cost and of revenues, administrative expenses, expenses necessary or incident to determining the feasibility or practicability of constructing the project and such other expenses as may be necessary or incident to the construction and acquisition of the project, the financing of such construction and acquisition and the placing of the project in operation.

(d) "Bonds", or "revenue bonds", shall mean revenue bonds of the authority issued under the provisions of this

section, including revenue refunding bonds, notwithstanding that the same may be secured by mortgage or the full faith and credit of a participating institution for higher education or any other lawfully pledged security of a participating institution for higher education.

(e) "Institution for higher learning", shall mean a nonprofit educational institution within the State authorized by law to provide a program of education beyond the high school level and which does not receive State financial support, but shall not include any state-supported institution.

(f) "Participating institution for higher education", shall mean an institution for higher education which, pursuant to the provisions of this section, undertakes the financing and construction or acquisition of a project or undertakes the refunding or refinancing of obligations or of a mortgage or of advances as provided in this section.

(D) There is hereby created a body politic and corporate to be known as the "Educational Facilities Authority", hereinafter in this section called the authority. The authority is constituted a public instrumentality and the exercise by the authority of the powers conferred by this section shall be deemed and held to be the performance of an essential public function. The authority shall consist of the members from time to time of the State Budget and Control Board, ex officio; and all the functions and powers of the authority are hereby granted to the State Budget and Control Board as an incident of its functions in connection with the public finances of the State.

(E) The purpose of the authority shall be to assist institutions for higher education in the construction, financing and refinancing of projects, and for this purpose the authority is authorized and empowered:

(a) to adopt rules and regulations for the conduct of its affairs and business.

(b) to adopt an official seal and alter the same at pleasure;

(c) to maintain an office at such place or places as it may designate;

(d) to sue and be sued in its own name, plead and be impleaded;

(e) to determine the location and character of any project to be financed under the provisions of this section, and to construct, reconstruct, remodel, maintain, manage, enlarge, alter, add to, repair, operate, lease, as lessee or lessor, and regulate the same, to enter into contracts for any or all of such purposes to enter into contracts for the management and operation of a project, and to designate a participating institution for higher education as its agent to determine the location and character of a project undertaken by such participating institution for higher education under the provisions of this section and as the agent of the authority, to construct, reconstruct, remodel, maintain, manage, enlarge, alter, add to, repair, operate, lease, as lessee or lessor, and regulate the same, and as the agent of the authority, to enter into contracts for any or all of such purposes, including contracts for the management and operation of such project;

(f) to issue bonds, including bond anticipation notes pursuant to Act No. 116 of 1965 and other obligations of the authority for any of the purposes of this section and to fund or refund the same all as provided in this section.

(g) generally, to fix and revise from time to time and charge and collect rates, rents, fees and charges for the use of and for the services furnished or to be furnished by a project or any portion thereof and to contract with any person, partnership, association or corporation or other body public or private in respect thereof;

(h) to establish rules and regulations for the use of a project or any portion thereof and to designate a participating institution for higher education as its agent to establish rules and regulations for the use of a project undertaken for such participating institution for higher education;

(i) to employ consulting engineers, architects, attorneys, accountants, construction and financial experts, superin-

tendents, managers, and such other employees and agents as may be necessary in its judgment, and to fix their compensation;

(j) to receive and accept from any public agency loans or grants for or in aid of the construction of a project or any portion thereof, and to receive and accept loans, grants, aid or contributions from any source of either money, property, labor or other things of value to be held, used and applied only for the purposes for which such loans, grants, aid and contributions are made;

(k) to mortgage any project and the site thereof for the benefits of the holders of revenue bonds issued to finance such project;

(l) to issue bonds to refund outstanding obligation, mortgages or advances issued, made or given by a participating institution for higher education for the cost of a project;

(m) to charge to and apportion among participating institutions for higher education its administrative costs and expenses incurred in the exercise of the powers and duties conferred by this section;

(n) to do all things necessary or convenient to carry out the purposes of this section.

(F) All expenses incurred in carrying out the provisions of this section shall be payable solely from funds provided under the authority of this section and no liability shall be incurred by the authority hereunder beyond the extent to which moneys shall have been provided under the provisions of this section.

(G) The authority is authorized and empowered directly or by and through a participating institution for higher education, as its agent, to acquire by purchase solely from funds provided under the authority of this section, or by gift or devise, such lands, structures, property, real or personal, rights, rights-of-way, franchises, easements and other interests in lands, including lands lying under water and riparian rights, which are located within the State as it may deem necessary or convenient for the construction or

operation of a project, upon such terms and at such prices as may be considered by it to be reasonable and can be agreed upon between it and the owner thereof, and to take title thereto in the name of the authority or in the name of a participating institution for higher education as its agent.

(H) When the principal of and interest on revenue bonds of the authority issued to finance the cost of a particular project or projects at a participating institution for higher education, including any revenue refunding bonds issued to refund and refinance such revenue bonds, have been fully paid and retired or when adequate provision has been made to fully pay and retire the same, and all other conditions of the trust indenture authorizing the same have been satisfied and the lien of such trust indenture has been released in accordance with the provisions thereof, the authority shall promptly do such things and execute such deeds and conveyances as are necessary and required to convey title to such project or projects to such participating institution for higher education, free and clear of all liens and encumbrances, all to the extent that title to such project or projects shall not, at the time, then be vested in such participating institution for higher education.

(I) (a) In anticipation of the sale of such revenue bonds, the authority may issue bond anticipation notes.

(b) The revenue bonds and notes of every issue shall be payable solely out of revenues of the authority derived from the particular project for which they are issued.

Notwithstanding that revenue bonds and notes may be payable from a special fund, they shall be and be deemed to be, for all purposes, negotiable instruments, subject only to the provisions of the revenue bonds and notes for registration.

(c) The revenue bonds may be issued as serial bonds or as term bonds, or the authority, in its discretion, may issue bonds of both types. The revenue bonds shall be authorized by resolution of the authority and shall bear such date, mature at such time, not exceeding fifty years from their

respective dates, bear interest at such rate, not exceeding eight per cent per annum, payable at such time, be in denominations, be in such form, either coupon or registered, carry such registration privileges, be executed in such manner, be payable in lawful money of the United States of America at such place, and be subject to such terms of redemption, as such resolution may provide. The revenue bonds or notes may be sold at public or private sale for such price as the authority shall determine, but which shall not at the time of sale yield more than eight per cent per annum computed according to standard tables of bond values.

(d) Any resolution authorizing any revenue bonds or any issue of revenue bonds may contain provisions, which shall be a part of the contract with the holders of the revenue bonds to be authorized, as to:

(1) pledging all or any part of the revenues of a project including revenues to be derived from a leasing of such project to secure the payment of the revenue bonds issued to defray the cost, or any portion of the cost, of such project; (2) the rentals, fees and other charges to be charged, and the amounts to be raised in each year thereby, and the use and disposition of the revenues; (3) the setting aside of reserves or sinking funds, and the regulation and disposition thereof; (4) limitations on the right of the authority or its agent to restrict and regulate the use of the project; (5) limitations on the purpose to which the proceeds of sale of any issue of revenue bonds then or thereafter to be issued may be applied and pledging such proceeds to secure the payment of the revenue bonds or any issue of the revenue bonds; (6) limitations on the issuance of additional bonds, the terms upon which additional bonds may be issued and secured and the refunding of outstanding bonds; (7) the procedure, if any, by which the terms of any contract with bondholders may be amended or abrogated, the amount of bonds the holders of which must consent thereto, and the manner in which such consent may be given; (8) limitations on the amount of moneys derived from the

project to be expended for operating, administrative or other expenses of the authority; (9) defining the acts or omissions to act which shall constitute a default in the duties of the authority to holders of its obligations and providing the rights and remedies of such holders in the event of a default; and (10) the mortgaging of a project and the site thereof for the purpose of securing the bondholders.

(e) Neither the members of the authority nor any person executing the revenue bonds or notes shall be liable personally on the revenue bonds or notes or be subject to any personal liability or accountability by reason of the issuance thereof.

(J) In the discretion of the authority any revenue bonds issued under the provisions of this section may be secured by a trust agreement by and between the authority and a corporate trustee, which may be any trust company or bank having the powers of a trust company within the State. Such trust agreement or the resolution providing for the issuance of such revenue bonds may pledge or assign the revenues to be received from, or proceeds of any lease of, the project for whose cost, or any part thereof, such revenue bonds are issued and may convey or mortgage such project or any portion thereof. Such trust agreement or resolution providing for the issuance of such revenue bonds may contain such provisions for protecting and enforcing the rights and remedies of the bondholders as may be reasonable and proper and not in violation of laws, including particularly such provisions as have hereinabove been specifically authorized to be included in any resolution of the authority authorizing revenue bonds thereof. Any bank or trust company incorporated under the laws of the State which may act as depository of the proceeds of bonds or of revenues or other moneys may furnish such indemnifying bonds or pledge such securities as may be required by the authority. Any such trust agreement may set forth the rights and remedies of the bondholders and of the trustee and may restrict the individual right of action by bondholders. In ad-

dition to the foregoing, any such trust agreement or resolution may contain such other provisions as the authority may deem reasonable and proper for the security of the bondholders. All expenses incurred in carrying out the provisions of such trust agreement or resolution may be treated as a part of the cost of the operation of a project.

(K) Revenue bonds issued under the provisions of this section shall not be deemed to constitute a debt or liability of the State or of any political subdivision thereof or a pledge of the faith and credit of the State or of any such political subdivision, but shall be payable solely from the funds herein provided therefor from revenues. All such revenue bonds shall contain on the face thereof a statement to the effect that neither the State of South Carolina nor the authority shall be obligated to pay the same or the interest thereon except from revenues of the project or the portion thereof for which they are issued and that neither the faith and credit nor the taxing power of the State of South Carolina or of any political subdivision thereof is pledged to the payment of the principal of or the interest on such bonds. The issuance of revenue bonds under the provisions of this act shall not directly or indirectly or contingently obligate the State or any political subdivision thereof to levy or to pledge any form of taxation whatever therefor or to make any appropriation for their payment.

(L) The authority may fix, revise, charge and collect rates, rents, fees and charges for the use of and for the services furnished or to be furnished by each project and may contract with any person, partnership, association or corporation, or other body, public or private, in respect thereof. Such rates, rents, fees and charges shall be fixed and adjusted in respect of the aggregate of rates, rents, fees and charges from such project so as to provide funds sufficient with other revenues, if any, (1) to pay the cost of maintaining, repairing and operating the project and each and every portion thereof, to the extent that the payment of such cost has not otherwise been adequately provided for, (2) to pay the principal of and the interest on

outstanding revenue bonds of the authority issued in respect of such project as the same shall become due and payable and (3) to create and maintain reserves required or provided for in any resolution authorizing, or trust agreement securing, such revenue bonds of the authority. Such rates, rents, fees and charges shall not be subject to supervision or regulation by any department, commission, board, body, bureau or agency of this State other than the authority. A sufficient amount of the revenues derived in respect of a project, except such part of such revenues as may be necessary to pay the cost of maintenance, repair and operation and to provide reserves and for renewals, replacements, extensions, enlargements and improvements as may be provided for in the resolution authorizing the issuance of any revenue bonds of the authority or in the trust agreement securing the same, shall be set aside at such regular intervals as may be provided in such resolution or trust agreement in a sinking or other similar fund which is hereby pledged to, and charged with, the payment of the principal of and the interest on such revenue bonds as the same shall become due, and the redemption price or the purchase price of bonds retired by call or purchase as therein provided. Such pledge shall be valid and binding from the time when the pledge is made; the rates, rents, fees and charges and other revenues or other moneys so pledged and thereafter received by the authority shall immediately be subject to the lien of such pledge without physical delivery thereof or further act, and the lien of any such pledge shall be valid and binding as against all parties having claims of any kind in tort, contract or otherwise against the authority, irrespective of whether such parties have notice thereof.

The use and disposition of money to the credit of such sinking or other similar fund shall be subject to the provisions of the resolution authorizing the issuance of such bonds or of such trust agreement. Any such resolution or trust agreement shall provide that such sinking or other similar fund shall be the fund for a particular project at an

institution for higher education from which such funds are derived and for the revenue bonds issued to finance such project and may, additionally, permit and provide for the issuance of revenue bonds having a subordinate lien in respect of the security herein authorized to other revenue bonds of the authority and, in such case, the authority may create separate or other similar funds in respect of such subordinate lien bonds.

(M) All moneys received pursuant to the authority of this section, whether as proceeds from the sale of bonds as revenues, shall be deemed to be trust funds to be held and applied solely as provided in this section. Any officer with whom, or any bank or trust company with which, such moneys shall be deposited shall act as trustees of such moneys and shall hold and apply the same for the purposes hereof, subject to such regulations as this section and the resolution authorizing the bonds of any issue on the trust agreement securing such bonds may provide.

(N) Any holder of revenue bonds issued under the provisions of this section or any of the coupons appertaining thereto, and the trustee under any trust agreement, except to the extent the rights herein given may be restricted by any resolution authorizing the issuance of or any such trust agreement securing, such bonds, may, either at law or in equity, by suit, action, mandamus or other proceedings, protect and enforce any and all rights under the laws of the State or granted hereunder or under such resolution or trust agreement, and may enforce and compel the performance of all duties required by this section or by such resolution or trust agreement to be performed by the authority or by any officer, employee or agent thereof, including the fixing, charging and collecting of the rates, rents, fees and charges herein authorized and required by the provisions of such resolution or trust agreement to be fixed, established and collected.

(O) The exercise of the powers granted by this section will be in all respects for the benefit of the people of this State, for the increase of their commerce, welfare and prosperity, and for the improvement of their health and

living conditions, and as the operation and maintenance of a project by the authority or its agent will constitute the performance of an essential public function, neither the authority nor its agent shall be required to pay any taxes or assessments upon or in respect of a project or any property acquired or used by the authority or its agent under the provisions of this section or upon the income therefrom, and any bonds issued under the provisions of this section, their transfer and the income therefrom, including any profit made on the sale thereof, shall at all times be free from taxation of every kind by the State and by the municipalities and other political subdivisions in the State.

(P) Bonds issued by authority under the provisions of this section are hereby made securities in which all insurance companies, trust companies, banking associations, investment companies, executors, administrators, trustees and other fiduciaries may properly and legally invest funds, including capital in their control or belonging to them.

(Q) The authority shall keep an accurate account of all its activities and of all its receipts and expenditures and shall annually in the month of January make a report thereof to its members, to the Governor and to the State Auditor, such reports to be in a form prescribed by the members, with the written approval of the auditor.

(R) The foregoing subsections of this section shall be deemed to provide a complete, additional and alternative method for the doing of the things authorized thereby and shall be regarded as supplemental and additional to powers conferred by other laws; *provided*, the issuance of revenue bonds and revenue refunding bonds under the provisions of this section need not comply with the requirements of any other law applicable to the issuance of bonds. Except as otherwise expressly provided in this section none of the powers granted to the authority under the provisions of this section shall be subject to the supervision or regulation or require the approval or consent of any municipality or political subdivision or any department, division, commission, board, body, bureau, official or agency thereof or of the State.

Appendix C

Rules and Regulations of the Educational Facilities Authority Adopted September 2, 1971

RESOLUTION

WHEREAS, there was created by Section 25 of Part II of Act 349 of the Acts of the General Assembly of the State of South Carolina for the year 1969 (the Act) the Educational Facilities Authority (the Authority), and

WHEREAS, the Authority is by the Act empowered to assist Institutions for Higher Learning as therein defined, and

WHEREAS, by the terms and provisions of the Act the Authority was authorized and empowered to establish rules and regulations for the conduct of its affairs and for the use of any Project or portion thereof, as the term Project is defined in the Act, and

WHEREAS, pursuant thereto the Authority has determined to promulgate rules and regulations in order to both facilitate the functioning of the Act and to insure the observance of the condition imposed by the Act that any Project undertaken pursuant to the Act shall not be used for sectarian instruction or as a place of religious worship and that no part of the proceeds of any Bonds shall be applied to any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity of any religious denomination,

NOW, THEREFORE, BE IT RESOLVED BY THE AUTHORITY IN MEETING DULY ASSEMBLED:

DEFINITIONS

1. All terms defined in the Act used herein shall have the meanings prescribed therefor by the Act.

APPLICATIONS OF INSTITUTIONS OF HIGHER LEARNING

1. All applications to the Authority by Institutions for Higher Learning for the financing, construction or equipment of a Project, or for the refunding of outstanding obligations, mortgages or other advances, shall be made in

writing and shall be accompanied by a certified copy of a resolution showing that the application was authorized by the Board of Trustees or other governing body of the Institution.

2. Each application shall set forth the purposes to which the proceeds of the bonds are to be applied.

3. Each application shall show whether the Institution has engaged the services of an underwriter who will market the bonds for the Institution, or whether it wishes the Authority to effect the sale of the bonds at public sale.

4. Each application shall set forth a properly worded description of the tract of land upon which the Project or Projects will be constructed.

5. Each application shall show existing liens, if any, on the Project site.

6. Each application shall have attached a copy of the proposed Lease Agreement to be made between the Institution and the Authority (or a summary of the terms thereof), and a copy of the proposed Trust Indenture (or a summary of the terms thereof) to be executed between the Authority and a trustee bank, and the form of the Assignment of the rights of the Authority under the Lease Agreement to the Indenture Trustee.

7. Each application shall be accompanied by an undertaking on the part of the Institution, obligating itself to pay all costs and expenses incurred by the Authority in connection with its processing of the application and the sale and issuance of the bonds. It may provide that if bonds are sold, such expense will be paid from the proceeds of such bonds.

8. Each application shall establish to the satisfaction of the Authority that the undertaking sought by the applicant is feasible and that adequate provision will be made for the payment of the principal and interest of the bonds sought to be issued, as and when the same become due and payable.

LEASE AGREEMENTS

1. Each Lease Agreement must contain a covenant obligating the Institution that neither the leased land, nor any facility located thereon, shall be used for sectarian instruction or as a place of religious worship, or in connection with any part of the program of a school or department of divinity of any religious denomination.

2. Each Lease Agreement shall contain a provision permitting the Authority or any agent of the Authority to conduct such inspections as may be necessary to determine whether the leased premises, or any portion thereof, or any facility located thereon, is being used or has been used for sectarian instruction or as a place of religious worship, or in connection with any part of the program of a school or department of divinity for any religious denomination.

3. Each Lease Agreement shall contain an appropriately worded provision providing that the covenant referred to in Paragraph 1 above may be enforced at the instance of the Authority, the Attorney General of South Carolina, or any taxpayer of South Carolina by a proceeding in any court of competent jurisdiction, by injunction, mandamus or other means.

4. If the Lease Agreement contains a provision permitting the Institution to repurchase the project upon payment of the bonds, then in such instance the Lease Agreement shall provide that the Deed of reconveyance from the Authority to the Institution shall be made subject to the condition that so long as the Institution, or any voluntary grantee of the Institution, shall own the leased premises, or any part thereof, that no facility thereon, financed in whole or in part with the proceeds of the bonds, shall be used for sectarian instruction or as a place of religious worship, or used in connection with any part of the program of a school or department of divinity of any religious denomination. The condition may provide, at the option of the Institution, that if the leased premises shall become the subject of an involuntary judicial sale, as a result of any foreclosure of any mortgage, or sale pursuant to any order

of any court, that the title to be vested in any purchaser at such judicial sale, other than the Institution, shall be in fee simple and shall be free of the condition applicable to the Institution or any voluntary grantee thereof.

TRUST INDENTURE

1. The Trust Indenture shall create a forecloseable lien by way of mortgage in favor of the Trustee thereof covering the project site and all equipment or other property to be located thereon, acquired with the proceeds of the Bonds.

2. The Trust Indenture shall mortgage the right, title and interest of the Authority in and to the Lease Agreement.

3. The Trust Indenture shall mortgage all lease rentals, revenues and receipts arising out of or in connection with the ownership of the Project, with such exceptions as may be approved by the Authority.

4. The Trust Indenture may likewise contain such provisions, covenants, rights and remedies as are customarily found in such documents. It may provide that upon the foreclosure of the mortgage and the sale of the premises to any person other than the Institution, any purchaser at any judicial sale resulting from such foreclosure, other than the Institution, shall receive title to the premises free and clear of the rights of the Authority and the Institution, in fee simple, and without conditions restricting the use of the premises.

SALE OF BONDS

1. Unless the Institution making application for a sale of bonds pursuant to the Act shall set forth in its application that it has engaged the services of an underwriter and has elected to have the underwriter dispose of the bonds at private sale or placement, all bonds issued pursuant to the Act which are sold by the Authority shall be sold at public sale after such advertisement as the Authority shall prescribe.

RECORD OF PROCEEDINGS

1. No bonds shall be delivered until a record of the proceedings incident to the issuance of the bonds and a copy (executed where possible) of the Lease Agreement, the Assignment and the Trust Indenture, have been filed in the office of the Secretary of State of South Carolina.

STATE OF SOUTH CAROLINA,
COUNTY OF RICHLAND.

I, P. C. SMITH, Auditor of the State of South Carolina, and Secretary to the State Budget and Control Board, and as such Secretary to Educational Facilities Authority, DO HEREBY CERTIFY:

That the said State Budget and Control Board is composed of the following:

His Excellency, John C. West, Governor of South Carolina and Chairman of the Board;

The Honorable Grady Leslie Patterson, Jr., State Treasurer;

The Honorable John Henry Mills, Comptroller General of South Carolina;

The Honorable Edgar A. Brown, Chairman of the Senate Finance Committee; and

The Honorable Robert James Aycock, Chairman of the House Ways and Means Committee.

That due notice of meeting of said Board, called to be held at the office of the Governor, in the Capital Building, at Columbia, South Carolina, at 3 P.M., Thursday, Sept. 2, 1971, was given to all members in writing, and at least four (4) days prior to said meeting; that all members of said Board were present at said meeting, with the exception of:

None

That at said meeting, a resolution, of which the attached is a true, correct and verbatim copy, was introduced by

Mr. Patterson, who moved its adoption; said motion was seconded by Mr. Mills, and upon the vote being taken and recorded it appeared that the following votes were cast:

FOR MOTION	AGAINST MOTION
5	0

The Chairman thereupon declared the Resolution unanimously adopted, and the original thereof has been duly entered in the permanent records of minutes of meetings of said Board, in my custody as its Secretary.
Sept. 9, 1971.

P. C. Smith,
Secretary